



7050-01

## **LEGAL SERVICES CORPORATION**

### **45 CFR Part 1603**

#### **Requests for Documents and Testimony**

**AGENCY:** Legal Services Corporation.

**ACTION:** Final rule.

**SUMMARY:** This final rule governs subpoenas and requests for LSC documents and testimony by non-federal litigants in cases in which LSC is not a party. This rule provides the public with guidance on where to send requests and establishes procedures by which those requests will be processed.

**DATES:** This final rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Stefanie K. Davis, Assistant General Counsel, 202-295-1563, [sdavis@lsc.gov](mailto:sdavis@lsc.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

LSC proposed to create a new regulation, known as a Touhy regulation, that would establish a process by which litigants in cases where LSC is not a party could obtain documents or testimony from LSC and its employees. Arising from the Supreme Court's decision in U.S. ex rel Touhy v. Ragen, 340 U.S. 462 (1951), Touhy regulations define agencies' procedures for responding to document or testimony requests, as well as individual agency employees' obligation to follow such procedures.

Between 2013 and 2017, LSC and its Office of the Inspector General (OIG) received several subpoenas and requests for testimony or documents but did not have internal or external guidance in place regarding such requests. At the OIG's recommendation, LSC added rulemaking on requests for documents and testimony to its rulemaking agenda in 2015. On October 15, 2017, the Operations and Regulations Committee (Committee) of LSC's Board of Directors (Board) voted to recommend that the Board authorize rulemaking on part 1603. On October 17, 2017, the Board authorized LSC to begin rulemaking.

Regulatory action was justified for four reasons. First, a Touhy regulation would promote efficiency and timeliness by identifying those LSC officials with the authority to respond to requests or subpoenas for documents or testimony and establishing a procedure for LSC's consideration of such requests. Second, it would minimize the possibility of involving LSC in controversies not related to its functions. Third, it would prevent the misuse of LSC's employees as involuntary expert witnesses for private interests or as inappropriate expert witnesses as to the state of the law. Fourth, it would maintain LSC's impartiality toward private litigants.

On January 21, 2018, the Committee voted to recommend that the Board approve this notice of proposed rulemaking (NPRM) for publication. On January 23, 2018, the Board accepted the Committee's recommendation and voted to approve publication of this NPRM with a 30-day comment period. LSC published the notice of proposed rulemaking in the Federal Register on February 1, 2018, 83 FR 4827. The comment period remained open for thirty days and closed on March 5, 2018.

On April 8, 2018, the Committee voted to recommend that the Board adopt this Final Rule and approve its publication in the Federal Register. On April 10, 2018, the Board accepted the Committee's recommendation and voted to adopt and approve publication of this final rule.

Materials regarding this rulemaking are available in the open rulemaking section of LSC's website at <http://www.lsc.gov/about-lsc/laws-regulations-guidance/rulemaking>. After the effective date of the rule, those materials will appear in the closed rulemaking section at <http://www.lsc.gov/about-lsc/laws-regulations-guidance/rulemaking/closed-rulemaking>.

## **II. Discussion of the Final Rule.**

LSC received no comments on the proposed rule. Consequently, LSC is adopting the text of the proposed rule published in the Federal Register at 83 FR 4827 with minor revisions. At the Operations and Regulations Committee meeting on April 8, 2018, the Committee recommended that LSC make two technical changes. The first was to include language in the definition of employee to make clear that this rule applies to non-Director members of Board committees. The second was to add language to § 1603.4(a) clarifying that individuals seeking testimony from an employee of OIG must follow the procedures in § 1603.4(b) for requesting testimony from the OIG Legal Counsel, rather than submitting the request to LSC's General Counsel. LSC Management concurred with the recommendations and revised the proposed final rule text accordingly.

In a final rule published elsewhere in this issue of the Federal Register, LSC is removing the existing version of part 1603 pertaining to state advisory councils. LSC is replacing it with this regulation.

## **List of Subjects in 45 CFR part 1603**

Administrative practice and procedure; Archives and records; Courts.

For the reasons discussed in the preamble, the Legal Services Corporation adds CFR part 1603 to read as follows:

### **PART 1603-TESTIMONY BY EMPLOYEES AND PRODUCTION OF DOCUMENTS IN PROCEEDINGS WHERE THE UNITED STATES IS NOT A PARTY**

Sec.

1603.1 Scope, purpose, and applicability.

1603.2 Definitions.

1603.3 What is LSC's policy on presentation of testimony and production of documents?

1603.4 How does a person request voluntary testimony from an employee?

1603.5 How will LSC respond to a request for expert testimony from an employee?

1603.6 How will LSC respond to a subpoena for documents?

1603.7 When will LSC certify the authenticity of records?

1603.8 Does this part give individuals any rights?

Authority: 42 U.S.C. 2996g(e).

#### **§ 1603.1 Scope, purpose, and applicability.**

(a) This part sets forth rules to be followed when a litigant requests an employee of the Legal Services Corporation (LSC), including LSC's Office of the Inspector General (OIG), to provide testimony in a deposition, trial, or other similar proceeding concerning information acquired in the course of performing official duties or because of such person's official capacity with LSC. This part also sets forth procedures for the handling of subpoenas for documents and other requests for documents in the possession of LSC or the OIG, and for the processing of requests for certification of copies of documents.

(b) It is LSC's policy to provide information, data, and records to non-federal litigants to the same extent and in the same manner that they are made available to the public. When subject to the jurisdiction of a court or other tribunal presiding over litigation between non-federal parties, LSC will follow all applicable procedural and substantive rules relating to the production of information, data, and records by a non-party. The availability of LSC employees to testify in litigation not involving federal parties is governed by LSC's policy to maintain strict impartiality with respect to private litigants and to minimize the disruption of official duties.

(c) This part applies to state, local, and tribal judicial, administrative, and legislative proceedings, and to federal judicial and administrative proceedings.

(d) This part does not apply to:

(1) Any civil or criminal proceedings to which LSC is a party.

(2) Congressional requests or subpoenas for testimony or documents.

(3) Consultative services and technical assistance provided by LSC in carrying out its normal program activities.

(4) Employees serving as expert witnesses in connection with professional and consultative services as approved outside activities. In cases where employees are providing such outside services, they must state for the record that the testimony represents their own views and does not necessarily represent the official position of LSC.

(5) Employees making appearances in their private capacity in legal or administrative proceedings that do not relate to LSC, such as cases arising out of traffic

accidents, crimes, domestic relations, etc., and not involving professional and consultative services.

(6) Any civil or criminal proceedings in State court brought on behalf of LSC.

(7) Any criminal proceeding brought as a result of a referral for prosecution by the OIG or by any other Inspector General in connection with a case worked jointly with the OIG.

### **§ 1603.2 Definitions.**

(a) Certify means to authenticate official LSC documents.

(b) Employee means current and former LSC employees, including temporary employees, OIG employees, and members of the Board of Directors and its Committees.

(c) LSC means the Legal Services Corporation. Unless explicitly stated otherwise, LSC includes the OIG.

(d) Testify and testimony include in-person, oral statements before a court, legislative or administrative body and statements made pursuant to depositions, interrogatories, declarations, affidavits, or other formal participation.

### **§ 1603.3 What is LSC's policy on presentation of testimony and production of documents?**

In any proceedings to which this part applies, no employee may provide testimony or produce documents concerning information acquired in the course of performing official duties or because of the person's official relationship with LSC unless authorized by the General Counsel or the OIG Legal Counsel pursuant to this part based on his or her determination that compliance with the request would promote LSC's objectives.

**§ 1603.4 How does a person request voluntary testimony from an employee?**

(a) All requests for testimony by an employee in his or her official capacity, except employees of OIG described in paragraph (b) of this section, and not subject to the exceptions set forth in § 1603.1(d) of this part must be in writing and addressed to the General Counsel.

(b) All requests for testimony by an employee of the OIG must be in writing and addressed to the OIG Legal Counsel.

(c) Requests must state the nature of the requested testimony, why the information sought is unavailable by any other means, and the reasons why the testimony would be in the interest of LSC.

**§ 1603.5 How will LSC respond to a request for expert testimony from an employee?**

No employee shall serve as an expert witness in any proceeding described in § 1603.1(c) of this part or before a court or agency of the United States unless the General Counsel or the OIG Legal Counsel authorizes the employee's participation.

**§ 1603.6 How will LSC respond to a subpoena for documents?**

(a) Whenever a subpoena commanding the production of any LSC record has been served upon an employee, the employee shall refer the subpoena to the General Counsel or the OIG Legal Counsel, as appropriate. The General Counsel or the OIG Legal Counsel shall determine whether the subpoena is legally sufficient, whether the subpoena was properly served, and whether the issuing court or other tribunal has jurisdiction over LSC. If the General Counsel or the OIG Legal Counsel determines that the subpoena satisfies all three factors, LSC shall comply with the terms of the subpoena

unless LSC takes affirmative action to modify or quash the subpoena in accordance with Fed. R. Civ. P. 45 (c).

(b) If a subpoena commanding the production of any record served upon an employee is determined by the General Counsel or the OIG Legal Counsel to be legally insufficient, improperly served, or from a tribunal not having jurisdiction, LSC shall deem the subpoena a request for records under the Freedom of Information Act. LSC shall handle the subpoena pursuant to the rules governing public disclosure established in 45 CFR part 1602.

(c) If the General Counsel or the OIG Legal Counsel denies approval to comply with a subpoena for testimony or has not acted by the return date, the employee will be directed to appear at the stated time and place, unless advised by the General Counsel or the OIG Legal Counsel that responding to the subpoena would be inappropriate. The employee will be directed to produce a copy of these regulations and respectfully decline to testify or produce any documents on the basis of these regulations.

#### **§ 1603.7 When will LSC certify the authenticity of records?**

Upon request, LSC will certify the authenticity of copies of records that are to be disclosed. The requesting party will be responsible for reasonable fees for copying and certification.

#### **§ 1603.8 Does this part give individuals any rights?**

This part is intended only to provide a process for receipt and processing of private litigants' requests for LSC documents and testimony. It does not, and may not be relied upon, to create a right or benefit, substantive or procedural, enforceable at law by a party against LSC.



Dated: April 11, 2018.

Stefanie Davis

Assistant General Counsel.

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